No. 12700

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

WHITNEY & CO., a corporation, Its Officers, and JAMES R. O'BRIEN, an individual, and His Representatives, Agents, and Employees,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT

BOGLE, BOGLE & GATES,
ROBERT W. GRAHAM,
J. KENNETH BRODY,
Attorneys for Respondents.

Central Building,
Seattle 4, Wash.

FRAYN PRINTING COMPANY

No. 12700

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

WHITNEY & CO., a corporation, Its Officers, and JAMES R. O'BRIEN, an individual, and His Representatives, Agents, and Employees,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT

BOGLE, BOGLE & GATES,
ROBERT W. GRAHAM,
J. KENNETH BRODY,
Attorneys for Respondents.

Central Building,
Seattle 4, Wash.

INDEX

Page

I. Statement of the Case 1

II. Question Presented 4

III. Argument 5

A. Formal Proof of Violation of the Commission's Cease and Desist Order by Respondent is Necessary to Entitle the Comsion to a Decree of Enforcement 5

1. Statutory Provisions Involved 5

a. The Clayton Act 7

(i) Applications for Enforcement Orders by the Commission 7

(ii) Petitions for Review or to Set Aside by Respondents 8

b. Federal Trade Commission Act 9

2. The Language of the Statute So Provides 13

3. The Decided Cases Unanimously So Hold 15

4. The Legislative History of This and Other Statutes Dictates this Conclusion 23

5. Decisions Involving Petitions for Review by Respondents Are Not Pertinent 27

B. The Fact of Violation Must Be Established Upon Hearing In An Adversary Proceeding 32

1. Standards of the Administrative Procedure Act Require a Judicial Determination of This Issue 32

2. Appropriate Reference Should be Made by This Court 37

IV. Conclusion 39

AUTHORITIES CITED

CASES

Page

Biddle Purchasing Co. v. F.T.C., 96 F.(2d) 687 (C.C.A. 2, 1938) 29

Charles etc. v. F.T.C., 143 F.(2d) 676 (C.C.A. 2, 1944) 29

Electro Thermal Co. v. F.T.C., 91 F.(2d) 477, 481 (1937) 31

F.T.C. v. Balme, 23 F.(2d) 615, 621 (C.C.A. 2, 1928) 15-16-17-37

F.T.C. v. Baltimore Paint & Color Works, Inc., 41 F.(2d) 474 (C.C.A. 4, 1930) 16-20-37-38

F.T.C. v. Fairyfoot Products Co., 94 F.(2d) 844, 845-6 (C.C.A. 7, 1938) 30

F.T.C. v. Herzog, 150 F.(2d) 450, 452 (C.C.A. 2, 1945) 10-15-16-37

F.T.C. v. Inecto, Inc., 70 F.(2d) 370 (C.C.A. 2, 1934) 38

F.T.C. v. Morrissey, 47 F.(2d) 101, 102 (C.C.A. 7, 1931) 20-21

F.T.C. v. Standard Brands (pend. Second Circuit) 38

F.T.C. v. Standard Educational Society, 86 F. (2d) 692, 698 (C.C.A. 2, 1936) 15-19-21-37

F.T.C. v. Standard Educational Society, 14 F. (2d) 947, 948 (C.C.A. 7, 1926) 16-19-27-39

F.T.C. v. Wallace, 75 F.(2d) 733, 735-6 (C.C.A. 8, 1935) 22

Great A. & P. Tea Co. v. F.T.C., 106 F.(2d) 667 (C.C.A. 3, 1939) 28

L. C. Mayers Co., Inc. v. F.T.C., 97 F.(2d) 365 (C.C.A. 2, 1938) 28

Page

Muller & Co. v. F.T.C., 142 F.(2d) 511, 520 (C.C. A. 6, 1944) 29

Oliver Brothers, Inc. v. F.T.C., 102 F.(2d) 763 (C.C.A. 4, 1939) 28

Pacific States Paper Assn. v. F.T.C., 4 F.(2d) 457 (1925) 30

Pacific States Paper Assn. v. F.T.C., 88 F.(2d) 1009 (1937) 30

Pep Boys etc. v. F.T.C., 122 F.(2d) 158 (C.C.A. 3, 1941) 29

Quality Bakers of America v. F.T.C., 114 F.(2d) 393 (C.C.A. 1, 1940) 29

Webb-Crawford v. F.T.C., 109 F.(2d) 268 (C.C. A. 5, 1940) 29

STATUTES

Page

Clayton Act, §11, 15 U.S.C.A. §21 7-8-13

Federal Administrative Procedure Act, 5 U.S.. C.A §§1001-1011 34-35-36

Federal Trade Commission Act, 15 U.S.C.A. §45 10-12

Interstate Commerce Act, 49 U.S.C.A. §16(12) .. 24-25

Packers & Stockyards Act, 7 U.S.C.A. §216 24-25

No. 12700

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

WHITNEY & Co., a corporation, Its Officers, and JAMES R. O'BRIEN, an individual, and His Representatives, Agents, and Employees,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT

I.

STATEMENT OF THE CASE

This is a proceeding pursuant to the provisions of Section 11 of the Clayton Act, 15 U.S.C.A. §21, initiated by the application of the Federal Trade Commission, petitioner (R. 30), for a decree enforcing a cease and desist order of the Commission entered March 24, 1946 (R. 27), and commanding respondent Whitney & Co., and its officers and respondent James R. O'Brien, his representatives, agents and employees (hereinafter jointly called respondent) to obey the same and comply therewith (R. 38).

Respondent concurs with the statement of petitioner concerning the issuance on February 12, 1945, by the Federal Trade Commission of a complaint charging violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. §13(c) (R. 3; Petitioner's Brief, p. 2). Respondent further concurs with the statements of petitioner concerning the proceedings before the Federal Trade Commission up to and including the issuance and service of the order to respondent to cease and desist from "paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation allowance, or discount in lieu thereof, upon purchases made for such buyer's own account" (R. 28, Petitioner's Brief, p. 2).

On April 19, 1946, respondents filed their report of compliance stating that they were fully complying with the order of the Commission and were no longer granting or allowing such commissions or brokerage. Respondent concurs with the statements of petitioner regarding the dissolution of Puget Sound and Alaska Trading Company, the formation of Carl Rubinstein (partnership), as well as the personnel and office and principal place of business of respondent Whitney & Co. as set forth at page 3 of Petitioner's Brief.

Following the entry of this order, respondent has engaged in numerous transactions with Christian

Brokerage Co. of Atlanta, Ga., and it is the contention of respondents that in all instances such sales of salmon were not made to Christian Brokerage Company as a buyer, but that this salmon was in fact sold to various buyers, by and through Christian Brokerage Company acting as broker and not as buyer.

On September 22, 1950, the Federal Trade Commission issued its application to this court for enforcement of its order to cease and desist (R. 30). In its application, petitioner alleged the corporate existence of Whitney & Co., and its operations in interstate commerce; the issuance of a complaint by petitioner; the filing of an answer thereto; and the issuance of a cease and desist order by the Commission, and its due service and present effect (R. 31-34).

In its application, petitioner further made reference in detail to certain sales of salmon on or about the dates of November 16, 1946, and July 14, 1947, and alleged, in addition to the payment of brokerage commissions by respondent to Christian Brokerage Company, certain facts by which petitioner seeks to conclude that these transactions involved payment of brokerage upon direct sales of salmon by respondent to Christian Brokerage Company in violation of the terms of the cease and desist order previously entered (R. 34-55).

In its answer to the application for enforcement,

respondent has admitted all of the allegations contained in the application, except those contained in paragraph 6, relating to the sales of salmon and the conclusions of fact derived therefrom. Respondent has denied that such sales constituted violations of the cease and desist order and has affirmatively stated that these sales were to various buyers by and through Christian Brokerage Co., acting as broker, but not as buyer (R. 59-60).

Petitioner seeks the immediate issuance of an order of enforcement of the Commission's cease and desist order of March 25, 1946, and a decree commanding respondents to obey the same and comply therewith, without any consideration of the issues tendered by respondent's answer to the application of petitioner; that is to say, without any determination of the issue as to whether or not respondent is in violation of the order sought to be enforced (R. 37-38).

II.

QUESTION PRESENTED

Petitioner has set forth four questions as those presented herein (Petitioner's Brief, p. 5). Concerning the first, respondent does not deny that the order to cease and desist was properly entered. Concerning the second, respondent does not deny that the Commission's application for enforcement charges respondent with having violated the order

to cease and desist. Concerning the fourth, respondent does not believe that this brief is a proper place for an evaluation of evidentiary matter. Respondent is of the further opinion that any attempted evaluation of evidentiary matter such as is asserted by petitioner in its application (R. 34-55) and in its brief (Petitioner's Brief, p. 38-44) can only be made at an appropriate time pursuant to an adversary proceeding at which time respondent shall have the opportunity of its day in court and the opportunity to present such evidence as in the opinion of respondent will demonstrate that petitioner's cease and desist order has not been violated as petitioner alleges.

Respondent therefore believes that the issue presently before the court is substantially correctly stated by pettiioner as his third question presented, *viz.*:

Whether formal proof of violation of the Commission's cease and desist order is necessary to entitle the Commission to a decree of enforcement in this proceeding.

III.
ARGUMENT

A. FORMAL PROOF OF VIOLATION OF THE COMMISSION'S CEASE AND DESIST ORDER BY RESPONDENT IS NECESSARY TO ENTITLE THE COMMISSION TO A DECREE OF ENFORCEMENT.

1. *Statutory Provisions Involved*

The question presented by this proceeding in-

volves an analysis of jurisdiction of this court over orders of the Federal Trade Commission. Both petitioner and respondent are in agreement that this jurisdiction is purely statutory (Petitioner's Brief, p. 12).

An examination of the underlying statutory provisions reveals that it is imperative in an analysis of this court's jurisdiction over such orders to differentiate as to (a) the party at whose instance the jurisdiction of this court is invoked, (b) the character of the order sought from this court as authorized by the statute involved, and (c) the basic statute pursuant to whose provisions the order of the Federal Trade Commission was originally issued. We submit that petitioner in its brief has failed to clarify the issues here presented because of a confusion in analysis and discussion of authority as to whether (a) the jurisdiction of this court is being invoked by the Commission or by a party against whom a cease and desist order has been issued, (b) the order sought in this court is a decree affirming the original order of the Commission or is a decree of enforcement, and (c) whether the Commission's order involved was issued under the provisions of the Clayton Act (15 U.S.C.A. §§13, 14, 18, 19 and 21), or under the provisions of the Federal Trade Commission Act. (15 U.S.C.A. §§41-58).

From the record herein it is apparent that (a) the jurisdiction of this court is being invoked by the

Commission (R. 30) which seeks (b) from this court "its decree enforcing the 'Commission's' aforesaid order to cease and desist, issued as aforesaid, commanding respondents * * * to obey the same and comply therewith" (R. 38-39), which cease and desist order was issued by the Commission (c) pursuant to the provisions of the Clayton Act (R. 30).

a. *The Clayton Act.*

(i) *Applications for Enforcement Orders by the Commission.*

Respondent and petitioner are in agreement (Petitioner's Brief, p. 13) that the applicable provisions of the statute (Clayton Act, §11; 15 U.S.C.A. §21) which govern applications by the Commission for enforcement orders under the Clayton Act and hence this matter are as follows:

> "*If such person* (against whom an order to cease and desist has been issued) *fails or neglects to obey such order of the Commission* * * * while the same is in effect, *the Commission* * * * *may apply to the Circuit Court of Appeals* of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, *for the enforcement of its order,* and shall certify and file with its application a transcript of the entire record taken and the report and order of the Commission * * *. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the

question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *" (Italics supplied)

(ii) *Petitions for Review or To Set Aside by Respondents.*

In the next following paragraph of §11 of the Clayton Act (15 U.S.C.A. §21) there is provided the procedure whereby a respondent before the Commission may petition the Court of Appeals to review and set aside an order issued by the Commission as follows:

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive."

It is stated by petitioner (Petitioner's Brief, p. 13):

"The Act provides two methods whereby jurisdiction over the final orders of the Com-

> mission can be acquired by the courts. *Each is separate, distinct and independent of the other, seeking entirely different action by, and asking entirely different affirmative relief from, the court, and the jurisdictional requirements vary slightly as to each.* One may be initiated by the Commission as in the instant case, seeking enforcement of its order; the other may be initiated by the respondent for the purpose of having the order set aside." (Italics supplied)

Respondent concurs in this statement with the exception that it may be noted that the "jurisdictional requirement" which "varies slightly" in the statutory provision first above quoted is that "the commission * * * may apply to the circuit courts of appeal * * * for the enforcement of its order"—*"If such person fails or neglects to obey such order of the Commission"* (a condition which finds no counterpart in the statutory provision governing petitions for review by a respondent). We suggest that it is also somewhat difficult to reconcile the above quotation from Petitioner's Brief with Petitioner's contention "In view of the very clear provisions of the Act, we submit that there is no valid reason for distinguishing between the conditions upon which an enforcement decree will be entered in the two types of proceedings" (Petitioner's Brief, pp. 28-29).

b. ***Federal Trade Commission Act.***

Prior to the amendments contained in the Wagner-Lea Act of 1938, the Federal Trade Commission

Act provided for the initiation of enforcement proceedings by the Commission (and also for petitions for review by respondents) of orders issued under this Act in language which was identical with the above quoted provisions of the Clayton Act (*Supra,* pp. 7-8). See *Federal Trade Commission v. Herzog,* 150 F.(2d) 450, 452 (C.C.A. 2, 1945). In 1938 the provisions of the Federal Trade Commission Act relating to *enforcement and review* of Commission orders under that Act were amended to read as follows: (15 U.S.C.A. §45):

> "(c) *Any person,* partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice *may obtain a review of such order* in the Circuit Court of Appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. *Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding* and of the question determined therein, *and shall have power* to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript *a decree* affirming, modifying, or setting aside the order of the Commission, and

enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite.* The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. *To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.* * * * (Italics supplied)

* * * * * * *

"(g) An order of the Commission to cease and desist shall become final—

"(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *"

"(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

As observed by Petitioner, orders now issued by the Commission under the Federal Trade Commission Act have become, in effect, self-executing and "it is no longer necessary to institute enforcement proceedings at all under the Federal Trade Commission Act. Unless review of orders issued thereunder is sought within 60 days after their serv-

ice, they become final, and their violation thereafter is subject to heavy civil penalties" (Petitioner's Brief, p. 35, note 13).

Of significance may be noted that the companion provisions in the Clayton Act for enforcement and review of Commission orders under the Act, as quoted above, were not amended by the Wagner-Lea Act of 1938. Further it may be pointed out that 15 U.S.C.A. §45(c) as amended specifically provides that in a petition for review of a Commission order under the Federal Trade Commission Act "to the extent that the order of the Commission is affirmed, the court shall thereupon issue its own commanding obedience to the terms of such order of the Commission."

In summary, the statutory provisions governing the jurisdiction of this court over orders of the Federal Trade Commission provide:

(1) Under the Clayton Act

(a) The Commission may make application for the enforcement and review of its order *"if such person * * * fails or neglects to obey such order of the Commission."*

(b) A respondent may petition to set aside and review an order of the Commission, in which event the question as to whether or not there has been a violation of the order is immaterial and of no concern.

(2) Under the Federal Trade Commission Act

(a) Prior to 1938 the provisions were the same as under the Clayton Act.

(b) Since 1938 the necessity of seeking enforcement orders by the Commission has been eliminated in view of the fact that there are

now substantial civil penalties provided for failure to obey a final order of the Commission, and upon petitions to set aside or review on behalf of respondents, the court is specifically directed to enter an enforcement order upon that portion of the order affirmed, in which cases as well the question as to violation of the order is not presented and is of no materiality.

2. *The Language of the Statute So Provides*

The basic question before the court is necessarily one of statutory construction. As set forth above, the applicable provision of Section 11 of the Clayton Act state "If such person fails or neglects to obey such order of the Commission * * * the Commission may apply to the Circuit Court of Appeals * * * for the enforcement of its order." Failure to obey the order is therefore the basic condition precedent to the power of this court to enter an order commanding obedience to the order of the Commission.

With a candid disregard of every decided case upon the point (Petitioner's Brief, pp. 15-16), the petitioner seeks to predicate its position upon an exercise in grammatical gymnastics which we respectfully submit would strain the semantics of the most convoluted philologist (See Petitioner's Brief, pp. 15-25, 35-36). The essence of petitioner's contention appears to be that "The clause, we believe, clearly sets up a condition precedent to the filing of an application for enforcement and not a condition precedent to the entry by the court of an en-

forcement decree" (Petitioner's Brief, p. 18).

The language of the statute is merely a clear, logical and chronological description of the conditions required for the circuit court to enter a decree of enforcement. Obviously, the violation must come first in point of time, and then the application for enforcement. And, upon filing of the application and transcript, the court obtains jurisdiction. This court cannot obtain jurisdiction directly upon the violation; and the statute necessarily provides that the violation of the order shall give rise to the filing of an application for enforcement. Even if one of these conditions must necessarily precede the other in time, they are equally vital conditions precedent to the jurisdiction of this court to order enforcement.

Such a statute may not be construed in isolated pieces as petitioner appears to urge. If reading one sentence above produces an interpretation which differs from that produced by reading another sentence, or which differs from that produced by reading the whole, that interpretation must be selected which gives a harmonious, logical, and uniform interpretation to the statute as a whole. We think that petitioners attempted reading of the first sentence of the applicable portion of Section 11 without relation to that which follows is not only without judicial support but violates every canon of statutory interpretation.

3. The Decided Cases Unanmiously So Hold

Petitioner urges a construction of the applicable provisions of Section 11 of the Clayton Act which would call upon this court to abdicate the judicial responsibility conferred upon it by the statute. Not only would petitioner deprive this court of the duty and responsibility of determining that a violation has occurred as a condition precedent to the issuance of an enforcement order but petitioner's position would deprive this court of the right to inquire into any other jurisdictional prerequisite, such as residence or place of business of respondent, in the event an issue as to the same were tendered by respondent.

The decided cases have unanmiously rejected any such construction of Section 11 and have clearly pointed out that there are two issues before the court on an application for enforcement brought by the Commission. First, the court must determine that the order of the Commission sought to be enorced is valid; and, second, the court must determine that there has been a violation of that order. Which of these issues is to be determined first is perhaps of little consequence, the majority rule being that the validity of the order should be first determined. *F.T.C. v. Standard Educational Society,* 86 F.(2d) 692, 698 (C.C.A. 2, 1936); *F.T.C. v. Balme,* 23 F.(2d) 615, 621 (C.C.A. 2, 1928); *F.T.C. v. Herzog et al.,* 150 F.(2d) 450, 452 (C.C.A. 2, 1945);

F.T.C. v. Baltimore Paint & Color Works, Inc., 41 F.(2d) 474 (C.C.A. 4, 1930). Compare *F.T.C. v. Standard Educational Society,* 14 F.(2d) 947, 948 (C.C.A. 7, 1926) holding that the validity of the order would not be determined until the violation of the order had been ascertained; and to the same effect see the concurring opinion of Judge Learned Hand in *F.T.C. v. Balme,* 23 F.(2d) 615, 622 (C.C.A. 2, 1928).

The precise point here at isse under Section 11 of the Clayton Act was decided by the Court of Appeals for the Second Circuit in *F.T.C. v. Herzog,* 150 F.(2d) 450, 452 (C.C.A. 2, 1945) wherein Judge Swan stated:

> "The Commission asks us to enter a decree commanding obedience to its order without regard to whether the respondents have violated it. The staute provides, 15 U.S.C.A. §21, that if a person against whom a cease and desist order has been issued 'fails or neglects to obey such order of the commission * * * while the same is in effect, the commission * * * may apply to the Circuit Court of Appeals * * * for the enforcement of its order * * *.' This provision is identical with the enforcement provisions of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, before its amendment in 1938, 15 U.S.C.A. §45. In construing those provisions we have held that after determining that the Commission's order is valid, the question of its violation must be referred to the Commission to take evidence and report on that issue before an enforcement order will be entered. Federal Trade Commission v. Balme, 2 Cir., 23 F.(2d) 615, 621, *certiorari* denied 277 U.S. 598, 48 S. Ct. 560, 72 L. Ed. 1007; Federal Trade Commission

v. Standard Education Society, 2 Cir., 86 F.(2d) 6982, 698, reversed in part on other grounds, 302 U.S. 112, 58 S. Ct. 113, 82 L. Ed. 141. We are asked to reconsider these decisions, but we see no reason to do so; no contrary decision has been cited. The same procedure has been followed in the Fourth Circuit, Federal Trade Commission v. Baltimore Paint & Color Works, 41 F.(2d) 474, 476; and the Seventh has adopted an even stricter rule, namely, that it will not consider the validity of the order until a violation of it has been shown. Federal Trade Commission v. Standard Education Society, 14 F. (2d) 947, 948. In the case at bar the violations of the Clayton Act which the Commission found occurred nearly five years ago; its order was issued on July 8, 1942, and its petition for enforcement was not filed until March, 1945. The respondents' answer to the petition asserts that 'at least since July 8, 1942' they have done business only as agents of the sellers of fur garments. Under these circumstances the customary procedure of requiring a hearing on the issue of violation seems especially appropriate.

"The order is affirmed and the proceeding is referred to the Commission as special master to hear and report whether the respondents have violated the provisions of the order."

As indicated above (*Supra* p. 9) Section 5 of the Federal Trade Commission Act prior to the 1938 Amendments was identical with the provisions of Section 11 of the Clayton Act. The Second Circuit had earlier under this statute as well held that a judicial determination of the violation of the Commission order was a condition precedent to the entry of a decree of the Circuit Court commanding obedience to that order. That court held in *F.T.C. v. Balme,* 23 F.(2d) 615, 621 (C.C.A. 2, 1928):

"The order of the Federal Trade Commission, adjudging the respondent guilty of unfair competition, is affirmed; the question of the present violation of section 5, for which enforcement is asked by the petition to this court, is referred to the Federal Trade Commission, with opportunity for the respondent to answer and submit proof, and with directions to the Commission to report its conclusions to this court.

"Ordered accordingly."

Of interest also is the concurring opinion of Judge Learned Hand in this case wherein he states (p. 622):

"I think that we have no jurisdiction to review the Commission's order until we have decided that the respondent has disobeyed it. Section 5 of the act says that, 'if such person * * * neglects to obey such order * * * the Commission may apply to the Circuit Court of Appeals.' That is not to say that the Commission may so apply, if they merely allege that the respondent has disobeyed; it is the fact, not their assertion, which conditions our jurisdiction. Such, at least, is the form of the act, and such the decision of the Seventh Circuit. Fed. Trade Com. v. Standard Education Soc. (C.C.A.) 14 F.(2d) 947.

"The answer is that we cannot decide that question, because section 5 confines out inquiry to the proceedings before the Commission up to the entry of its order, and that the respondent's disobedience necessarily occurred theretofore. In the first place, if the fact is a condition on our jurisdiction we have inherent power, like any other court, to decide it, else we could not act at all. In the second, we must decide it at some time anyway, and I can perceive no greater power to act after the order has been valid than before. We are assuming a power in either event not conferred on us in words."

To the same effect see *F.T.C. v. Standard Education Society,* 86 F.(2d) 692, 698 (C.C.A. 2, 1936) wherein Judge Learned Hand states:

> "* * * After the order has been amended in accordance with the foregoing, the proceeding will be remitted to the Commission as special master to hear and report whether the respondents have complied with the provisions which are affirmed. The cause will await in this court the return of that report for further proceedings."

The Seventh Circuit Court of Appeals in *F.T.C. v. Standard Education Society,* 14 F.(2d) 947, 948 (C.C.A. 7, 1926) has likewise held that the issue of violation must be determined judicially prior to the entry of an enforcement order upon application of the Commission, Judge Evans writing for the court:

> "If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the commission may apply for an enforcement order. It is only in case the respondent 'fails or neglects to obey such order of the commission while the same is in effect' that petitioner has any standing in this court. Not only is this the plain provision of the statute, but petitioner's petition is drawn on this theory. If the allegation such as heretofore quoted from the petition be a necessary one, it follows that such allegation, together with respondent's denial, presents an issue of fact necessarily determinable before this court can or should act upon the merits of the application.
>
> "* * * It was the apparent intention of the Congress to give the practicer of the alleged unfair methods an opportunity to mend its ways before subjecting it to a decree of court, with its attending embarrassment. To accomplish

this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed. It follows, therefore, that petitioner's motion to strike out the portions of respondent's answer heretofore quoted should be denied."

The Fourth Circuit Court of Appeals has also held to the same effect in *F.T.C. v. Baltimore Paint & Color Works,* 51 F.(2d) 474, 476 (C.C.A. 4, 1930), it being stated:

"The question presented is as to the method of procedure that should be followed by the Circuit Court of Appeals after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying, but where the respondent has had no opportunity to present evidence that it is not violating the order, and where no proof had been taken before the Commission on that question. * * *

"The Commission alleges in its petition that its order is being violated, and the respect due by the courts to an independent agency of the government forbids the presumption that this allegation of the Commission is not made in good faith and based upon substantial grounds. * * *

"The order of the Commission is not enforceable until affirmed by this court, and it would be a useless thing for the Commission to try the question of whether its order is being violated before affirmation of the order by this court. * * *"

Petitioner here seeks comfort in the decision of *F.T.C. v. Morrissey,* 47 F.(2d) 101, 102 (C.C.A. 7, 1931 wherein an order of enforcement was granted upon application of the Commission under §5 of the Federal Trade Commission Act prior to amendment without any hearing as to the matter of violation. (Petitioner's Brief, pp. 15, 39). It is stated in the *Morrissey* case:

> *"If nothing appeared in the proceedings to indicate that respondent had in some respect failed to comply with the Commission's order, we would feel compelled to follow the practice which we approved* in Federal Trade Commission v. Standard Education Soc., 14 F.(2d) 947, 948, by first causing inquiry to be made as to whether respondent had failed to comply with the order. We there so held pursuant to the words of the statute, 'If such person * * * fails or neglects to obey such order of the commission * * * the commission may apply to the Circuit Court of Appeals,' etc.
>
> "But if from proceedings following the entry of the order it is fairly apparent that in some respect the order has not been obeyed, an affirming decree by the court will be justified. Respondents' answer fails in an important respect to assert compliance with the order. It asserts compliance only as to labels, placards, signs, and advertising, but not as to the use of the name of any such fruit as a part of a corporate or trade-name under which appellee transacted business, a practice which was specifically prohibited by the order."

To the same effect see *F.T.C. v. Wallace,* 75 F.(2d) 733, 735-6 (C.C.A. 8, 1935) wherein it is said:

> "In his said answer respondent Wallace does not deny that the findings are supported by substantial evidence, nor the allegation in the commission's petition that he has failed and neglected to obey the cease and desist order. * * *"

A reading of these cases indicates that, on the face of the pleadings in the proceedings following the issuance of the Commission's cease and desist order, the respondent was in violation of the order. Accordingly there was no need for an inquiry as to the fact of violation since this was established by the

admissions in the pleadings and the Seventh Circuit Court of Appeals expressly disavowed any intention of departing from the rule it had earlier announced in the *Standard Education Society* case.

In the instant case, by paragraph 6 of its answer, respondent has placed squarely in issue the fact of violation, and has affirmed that its conduct was at all times in compliance with the terms of the order of the Commission. There is nothing upon the face of "proceedings following the entry of the order" which would entitle this court to grant a decree of enforcement based on the rationale of the *Morrissey* case.

This survey of all of the decided cases upon the issue shows, therefore, a complete unanimity on the part of the courts which have considered the problem if not of rationale, at least of judgment and procedure. In each case, the courts have declined to enter an order of enforcement without first providing some method for a hearing upon the issue of the fact of violation. No case has been cited by petitioner nor revealed by our research in which an order of enforcement has been issued forthwith at the request of the Commission upon an allegation of violation by the Commission in the face of a denial of that fact by the respondent. And we do not understand petitioner to contend that its position finds support in a single decided case where the Commission has sought an order of enforcement in

the circuit courts.

4. *The Legislative History of This and Other Statutes Dictates This Conclusion.*

Petitioner states, in footnote 10, at page 32 of his brief, that:

"So far as we can find, nothing in the legislative history of the Clayton Act throws any light upon the question."

Respondent is content to accept this as an accurate statement, and to rely rather upon the language of the statute, its history in the courts, and the requirements of proper procedure as hereinafter set out.

There is nothing in petitioner's excerpts from legislative history of the provisions of the Federal Trade Commission Act which relates to the point at issue (Petitioner's Brief, pp. 30-35). The Conference Report statement that

> "The findings of the Commission as to the facts are to be conclusive." (Petitioner's Brief, p. 31)

is only a restatement of the language of the statute relating to the function of the Commission in entering the original order.

The Statement of Senator Cummins (Petitioner's Brief, p. 31) is also simply a paraphrase of various provisions of the statute relating to the power of the court to affirm, reverse, or modify the factual

conclusions in the original proceeding which are conclusive if supported by testimony.

In short there is no legislative history as petitioner has stated which "throws any light upon the question." Petitioner urges that Congress included more explicit provisions in the Interstate Commerce Act, 49 U.S.C.A. §16(12), and the Packers and Stockyards Act, 7 U.S.C.A. §216, directing the court to determine upon hearing the fact of violation of the administrative order as a condition precedent to the entry of a decree of enforcement and thereby seeks to draw the conclusion that "proof of a violation of an order to cease and desist is not a condition precedent to the entry of a decree of enforcement under the Clayton Act" (Petitioner's Brief, pp. 29-30).

In each of these Acts, and in the Clayton Act, there are provisions for action by the appropriate administrative agency for *"enforcement"* of the order of the agency. In each case *"enforcement"* is the operative word to categorize the nature of the proceedings. Such proceedings must be sharply distinguished from proceedings by a party against whom the order has been entered to review and set aside the order (see *infra.* pp. 27-32). The Clayton Act provides that in such review proceedings the court has the power to affirm, modify or reverse the order of the Commission "as in the case of an application by the Commission for the enforcement of its or-

der," but this does not make the review proceeding of itself an enforcement proceeding.

As the Stockyards and Packers Act and the Interstate Commerce Act clearly demonstrate, when an administrative agency seeks enforcement of its order, it must first prove a violation thereof. These acts clearly establish this as a standard to be observed in the judicial enforcement of administrative action. This is precisely the requirement of the Clayton Act, and the very reason why the section pertaining to enforcement by the Commission commences with the words "If such person fails or neglects to obey the order of the Commission or board * * *". This is a short but equally effective way of saying what was said at greater length in the Stockyards and Interstate Commerce Acts; and is an expression of that same common denominator which underlies the enforcement provisions of all three Acts.

The excerpts from the Conference Report upon the National Labor Relations Act (Brief of Petition, p. 34) demonstrate that just such a phrase as introduces the enforcement procedure of the statute in question (15 U.S.C.A. §21)[1] was dropped from the National Labor Relations Act so that it might be clear that the issue of violation by the respondent was irrelevant. Surely this should indicate that

---

[1] "If such a person fails and neglects to obey such order of the Commission while the same is in effect . . ."

where such language is in fact present, there was a converse intent that the issue of violation by the respondent must be met.

The very fact that the Federal Trade Commission Act, before its amendment in 1938 by the Wagner-Lea Act, 15 U.S.C.A. §45, contained provisions for the initiation of enforcement proceedings by the Commission, in substantially identical form to those of the Clayton Act (See pp. 9-10 *supra*) becomes all the more significant in view of the fact that these enforcement provisions were retained in the Clayton Act, 15 U.S.C.A. §21. It seems clear that the intent of Congress is plainly declared that while the issue of violation of the Commission's order is no longer of concern in proceedings for the enforcement of Commission orders under the Federal Trade Commission Act, since suit may be brought for substantial penalties at such time as the Commission's order becomes final (*supra* pp. 11-12), nevertheless the issue of violation is still the basic condition precedent to enforcement by the Commission through the processes of the Circuit Courts of orders issued under the Clayton Act.

Congress in enacting the Wagner-Lea Act, had before it the interpretation of the courts of the language in question in the *Balme, Standard Education Society* (Second Circuit), *Standard Education Society* (Seventh Circuit), *Morrissey* and *Baltimore Paint & Color Works* cases discussed above. These

decisions may have been instrumental in altering the provisions of 15 U.S.C.A. §45, and we may speculate upon the fact that concurrent enforcement of the Clayton Act is available through the Department of Justice perhaps accounted for the decision of Congress to leave the enforcement provisions of the Clayton Act unaltered. But in any event it is significant, in the light of these interpretations, that 15 U.S.C.A. §21 was not affected by the Wagner-Lea amendments and we suggest that the petitioner's recourse is not the tortuous construction of Section 11 of the Clayton Act here urged upon this court but, as suggested in *F.T.C. v. Standard Education Society,* 14 F.(2d) 947, 948 (C.C.A. 7, 1926), "is an argument that should be addressed to Congress rather than to this court."

5. ***Decisions Involving Petitions for Review by Respondents Are Not Pertinent.***

As set forth above, *supra,* p. 8, petitions in this court to review or set aside Commission orders at the instance of respondents before the Commission, stand upon entirely separate and distinct statutory provisions (quoted above at p. 8) from the provisions relating to applications for enforcement at the instance of the Commission. And as pointed out above, although petitioner at the outset of its brief recognizes that "each is separate, distinct and independent of the other, seeking entirely different ac-

tion by, and asking entirely different affirmative relief from the court" (Petitioner's Brief, p. 13), we submit that the confusion in petitioners position is illustrated by its conclusions that "there is no valid reason for distinguishing between the conditions upon which an enforcement decree will be entered in the two types of proceedings" and "If the Commission is entitled to a decree of enforcement without proving a violation of its order in one instance, it is equally entitled to a decree of enforcement without the proof of a violation in the other" (Petitioner's Brief, p. 28).

Respondent recognizes that by the substantial weight of authority, where *a respondent* before the Commission has petitioned to review and set aside an order of the Commission pursuant to the statutory provisions set forth above at p. 8, the court may in such proceedings initiated by the respondent enter a decree affirming the Commission's order and *in the same proceeding* enter a decree of enforcement commanding the respondent to obey such order.

L. & C. Mayers Co., Inc., v. F.T.C., 97 F. (2d) 365 (C.C.A. 2, 1938) (Petition to review under 15 U.S.C.A. §45, prior to 1938 Amendments);

Oliver Brothers, Inc., v. F.T.C., 102 F.(2d) 763 (C.C.A. 4, 1939) (Petition to review and set aside under the Clayton Act);

Great A. & P. Tea Co. v. F.T.C., 106 F.(2d) 667 (C.C.A. 3, 1939) (Petition to review

and set aside under the Clayton Act);

Webb-Crawford v. F.T.C., 109 F.(2d) 268 (C.C.A. 5, 1940) (Petition to review under the Clayton Act);

Quality Bakers of America v. Federal Trade Commission, 114 F.(2d) 393 (C. C.A. 1, 1940) (Petition to review and set aside under the Clayton Act).

Petitioner refers (Petitioner's Brief, p. 27, note 5) to *Muller & Co. v. F.T.C.*, 142 F.(2d) 511, 520 (C.C.A. 6, 1944) which case it may be noted in passing, along with *Pep Boys, etc., v. F.T.C.*, 122 F.(2d) 158 (C.C.A. 3, 1941) and *Charles, etc., v. F.T.C.*, 143 F.(2d) 676 (C.C.A. 2, 1944), was based upon the amended provisions of the Federal Trade Commission Act (15 U.S.C.A. §45) which *specifically require the court as above noted* (*supra*, p. 10) to "issue its own order commanding obedience to the terms of such order of the Commission."

Petitioner also refers to *Biddle Purchasing Co. v. F.T.C.*, 96 F.(2d) 687 (C.C.A. 2, 1938) and certain unreported decisions (Petitioner's Brief, pp. 26-27) and suggests that contempt orders may issue upon decrees affirming Commission orders even though the reported opinion indicates that no decree of enforcement was entered. In the event no decree of enforcement as such is entered by the court (which by the weight of authority as above indicated may be done in proceedings to review and set aside initiated by the respondent), it would seem conceptu-

ally a bit difficult to ascertain of what a respondent might be adjudged in contempt; and from the reported opinions of this court in *Pacific States Paper Assn. v. F.T.C.*, 4 F.(2d) 457 (1925) and 88 F.(2d) 1009 (1937), no ready answer to this query would appear to be forthcoming.

The problems presented are well pointed up in the decision of the Seventh Circuit in *F.T.C. v. Fairyfoot Products Co.*, 94 F.(2d) 844, 845-6 (C.C.A. 7, 1938) where it is stated:

> "In cause No. 5426, entitled Fairyfoot Products Company, a Corporation, Petitioner, v. Federal Trade Commission, Respondent, the petitioner sought a review of a 'cease and desist' order of the Federal Trade Commission. This court concluded that the 'cease and desist' order was a proper one and stated its decision in the following language: 'The order of the Commission is affirmed.'
>
> "The Federal Trade Commission now files its petition praying that a rule issue against the Fairyfoot Products Company to show cause why it should not be adjudged in contempt for an alleged violation of the aforesaid order or decree.
>
> "* * *.
>
> "The necessary conclusion from the decisions of this circuit and we believe from a proper construction of section 5, is that a general order of affirmance is not equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the 'cease and desist' order has been issued.
>
> "* * *.
>
> "We conclude that the entry of general affirmance by this court in cause No. 5426 was

> not in legal effect an enforcement decree of this court embodying the prohibitions of the 'cease and desist' order of the Commission and enjoining the petitioner from violating the injunctive order of this court.
>
> "The motion of the respondent herein, Fairyfoot Products Company, to dismiss the petition of the Federal Trade Commission for rule to show cause is sustained, and the petition is dismissed."

And by way of further clarifying the case references by petitioner, it should be pointed out that the reported opinion of this court in *Electro Thermal Co. v. F.T.C.*, 91 F.(2d) 477, 481 (1937) does not indicate that a decree of enforcement was entered by the court, it being held:

> "It would seem, in view of the statute, that the Commission's informal prayer for affirmation of the Commission's order is properly here. It appears that the court is vested with plenary jurisdiction no matter which party brings the cause before it. The same language as to the court's jurisdiction is used in one case as in the other.
>
> "The order of the Commission is affirmed."

On the contrary, the court's reference to "jurisdiction" appears clearly to refer to the power of the court to hear and consider the matter (*i.e.*, the validity of the cease and desist order) rather than to the power of the court to issue a decree of enforcement (Petitioner's Brief, p. 28).

In any event, as above stated, there appears to be no question but that *in a proceeding initiated by the respondent* to review or set aside a Commission or-

der under the pertinent provisions of Section 11 of the Clayton Act *a decree of enforcement as well as a decree of affirmance* may be entered by the Court of Appeals *in that proceeding.* As also set forth above *the issue of a violation is not involved in such proceedings and the statutory provision makes no reference to any violation of an order as a prerequisite for any judicial action or decree.*

But this proceeding before this court does not arise upon a petition to review initiated by this respondent. This proceeding is upon an application for enforcement sought by the Commission under an entirely separate and distinct statutory provision which very plainly and distinctly provides that *"if such person fails or neglects to obey such order of the Commission* * * * the Commission * * * may apply to the Circuit Court of Appeals * * * for the enforcement of its order."

B. THE FACT OF VIOLATION MUST BE ESTABLISHED UPON HEARING IN AN ADVERSARY PROCEEDING

1. *Standards of the Administrative Procedure Act Require a Judicial Determination of This Issue.*

No more apt and succinct statement of petitioner's position may be found than at page 19 of its brief. There petitioner states:

> "It therefore appears to us that the question whether a respondent has violated the Commission's order is not a judicial, but an admin-

istrative, question and one upon which the Commission's determination is conclusive."

Again at page 20, petitioner states:

"* * * Congress has left to the sole discretion of the Commission the question whether its action is reasonable and whether probable cause exists."

Petitioner assures the court that the Commission's procedures are careful and well-grounded, and that the Commission will under no circumstances abuse the discretion confided in it. However, parties appearing before the Commission or in actions brought before this court by the Commission, are entitled, in the determination of vital questions, not only to the assurance of the proper exercise of discretion by an administrative agency, but also to the safeguards of judicial review. Petitioner would make its own determination conclusive, not only upon the parties, but upon the courts. Petitioner suggests (Petitioner's Brief, p. 19) that the question of violation is analogous to the determination by the Commission in the first instance to issue a complaint, a determination which is to be resolved by an inquiry as to whether there is "reason to believe that any person is violating" the statute. The sophistry of this suggestion not only is manifest from the quoted language itself, but stands out in bold relief with a comparison of the purpose and objective of the two statutory provisions—one being a determination to initiate proceedings, a determination which in and of itself adjudicates nothing,

and the other a determination which serves as the condition precedent to subjecting a respondent to the rigors of contempt proceedings before this court.

The Federal Administrative Procedure Act, 5 U.S.C.A. §§1001-1011, Public Law 404, 79th Congress, 2d Sess. (1946), provides standards for judicial review applicable to the proceeding at the bar. The basic principle is stated in 5 U.S.C.A. §1009a:

> "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

This evinces a clear intent to broaden the scope of judicial review of administrative action. Admittedly, certain administrative procedures are precluded from judicial review, others have their own specified procedures. This section of the Act is important because it indicates the spirit in which the act is to be construed.

Title 5 U.S.C.A. §1009b relates directly to enforcement proceedings and provides:

> "Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

The essence of this requirement is that there shall be review in such cases. If there is otherwise an adequate *and* exclusive remedy, the Administrative

Procedure Act is inoperative. If there is not such a remedy, that Act requires that one be furnished.

Title 5 U.S.C.A. §1009c requires that:

> "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Again, judicial review is to be provided even if at present there is not an existing statutory remedy. Certainly petitioner claims that its action in determining that there has been a violation by respondent of its cease and desist order is a final action.

Respondent believes that the pertinent provisions of the Clayton Act, quoted above, specifically import a method of judicial review of the issue of violation. If this is not the case, however, then the Commission's final administrative determination of violation should be judicially reviewable under 5 U.S.C.A. §1009(c). For, failing this, respondent has no other "adequate remedy."

Title 5 U.S.C.A. §1009(e) more particularly defines the scope of review. It states that the court shall

> "(B) hold unlawful and set aside agency action, findings and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the

> requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Were the action of the Commission in determining respondent to be in violation arbitrary or capricious, it could be set aside under this Act, and likewise if it were unsupported by substantial evidence or unwarranted by facts to the extent that the facts are subject to trial *de novo*.

It is respondent's contention that the procedure adopted by the Second, Fourth and Seventh Circuits in the cases cited, furnishes adequate safeguards, and in its essence, carries out the intent of the Administrative Procedure Act. In each case, the question of violation has been referred to a fact-finding body for report back to the court, rather than for final determination. Under such circumstances, it is believed that application of the Federal Administrative Procedure Act is not required.

If, however, the contention of petitioner is correct that the Clayton Act, as written, makes the determination of the Commission on the question of violation of the Commission's order final, then we submit there is presented a proper situation for the application of the remedies, standards and philos-

ophy of the Administrative Procedure Act.

2. *Appropriate Reference Should Be Made By This Court.*

From the foregoing we think this court must conclude that the question of violation of the Commission's order here involved, which has been placed in issue by respondent's answer (R. 59-60) to petitioner's application for enforcement, must necessarily be resolved by a judicial determination that such violation has in fact occurred before any decree of enforcement can be entered by this court. From the decisions discussed above (*supra,* pp. 15-23) it is apparent that in the majority of the cases where the Circuit Courts have been confronted with the problem, there has been a reference of the issue to the Federal Trade Commission for determination. *Federal Trade Commission v. Balme,* 23 F.(2d) 615; *Federal Trade Com'n. v. Baltimore Paint & Color Works,* 41 F.(2d) 474; *Federal Trade Commission v. Standard Education Soc.,* 86 F.(2d) 692; *Federal Trade Commission v. Herzog,* 150 F.(2d) 450. The reasons for such reference were succinctly stated by the court in the *Baltimore Paint & Color Works* case as follows:

> "This court has no machinery for investigating or ascertaining the fact as to the compliance or noncompliance with an order of the Commission. The Commission has such machinery and is the proper body to pass upon that question.

> "It is therefore the conclusion of the court that the order of the Federal Trade Commission, requiring the respondent, Baltimore Paint & Color Works, Inc., to cease and desist from certain practices found by the Commission to constitute unfair methods of competition, be, and the same is, affirmed. The question of the violation of the order, the enforcement of which is asked in the petition, is referred to the Federal Trade Commission, with opportunity for the respondent to answer and submit proof, and with direction to the Commission to report its conclusions to this court." (p. 476)

A comparable result has also been reached in *F.T.C. v. Standard Brands,* now pending in the Second Circuit (as discussed in Petitioner's Brief, p. 14, note 5) and *F.T.C. v. Inecto Inc.,* 70 F.(2d) 370 (C.C.A. 2, 1934) where apparently the Commission upon its own initiative has conducted adversary hearings on the question of violation of the Commision's order prior to filing the application for enforcement.

It is the petitioner's contention in this proceeding, however, that "the decree of this court therefore should be entered, as the statute provides, solely upon the record certified to the court by the Commission. There is no other record in existence and the Act does not contemplate any other record which might be certified to the court" (Petitioner's Brief, p. 25).

It would accordingly appear that the petitioner disavows any desire to hear this issue of violation on referral from this court. And since the decision

of this matter is necessarily one which must be made by this court, we suggest as the more appropriate procedure under the circumstances of this case, a referral of this issue to a referee or commissioner appointed by this court in accordance with the procedure established by the Seventh Circuit in *F.T.C. v. Standard Education Society,* 14 F.(2d) 947, 949 (C.C.A. 7, 1926) wherein it is held:

> "* * *. It is further ordered that, unless the parties can within 20 days hereof agree upon a statement of facts respecting this issue of neglect, failure, or refusal of respondent to obey the order of the commission, either party may apply to the court for the appointment of a referee or commissioner to hear the testimony and report his findings upon this issue."

VI.

CONCLUSION

In the light of the foregoing, respondent submits that there can be no decree of enforcement entered in this proceeding in the absence of a judicial determination that respondent has in fact violated the order of the Federal Trade Commission issued March 25, 1946. Respondent prays, therefore, that petitioner's application for enforcement be dismissed. In the alternative respondent requests that this court make reference of this proceeding to such person as it may deem appropriate for a hearing upon the issue as to whether or not respondent has in fact violated the Commission's order of March

25, 1946, and that such person be directed to report back its findings to this court for the determination by this court as to whether or not respondent has in fact violated such order.

Respectfully submitted,

BOGLE, BOGLE & GATES,
ROBERT W. GRAHAM,
J. KENNETH BRODY,

Attorneys for Respondents.